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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3  
4 PETER DELVECCHIA et al., )  
5 Plaintiffs, ) Case No. 2:19-cv-01322-KJD-DJA  
6 vs. ) Las Vegas, Nevada  
7 FRONTIER AIRLINES, INC., et ) Monday, December 4, 2023  
8 al., ) Courtroom 3B  
9 Defendants. ) Motion Hearing  
10 )  
11 )  
12 ) **C E R T I F I E D C O P Y**  
13 )  
14 )  
15 )  
16 )

17 TRANSCRIPT OF PROCEEDINGS

18  
19 BEFORE THE HONORABLE DANIEL J. ALBREGTS,  
20 UNITED STATES MAGISTRATE JUDGE  
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22  
23  
24

25 APPEARANCES: See next page

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TRANSCRIBED BY: Samantha N. McNett  
Samantha\_McNett@nvd.uscourts.gov

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1 APPEARANCES:

2 For the Plaintiffs:

3 **JOHN MCKAY, ESQ.**  
4 PARK AVENUE LAW, LLC  
5 201 Spear Street, Suite 1100  
6 San Francisco, California 94105  
7 434-531-9569

8 For the Defendants:

9 **BRIAN MAYE, ESQ.**  
10 HINSHAW & CULBERTSON, LLP  
11 151 North Franklin Street, Suite 2500  
12 Chicago, Illinois 60606  
13 312-422-5713

14 -AND-

15 **CHARLES MICHALEK, ESQ.**  
16 ROGERS MASTRANGELO  
17 700 South 3rd Street  
18 Las Vegas, Nevada 89101  
19 702-383-3400

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1 LAS VEGAS, NEVADA; MONDAY, DECEMBER 4, 2023; 10:03 A.M.

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3 P R O C E E D I N G S

4 THE COURTROOM ADMINISTRATOR: Peter DelVecchia versus  
5 Frontier Airlines, et al., 2:19-cv-1322-KJD-DJA. This is  
6 before the Court on motion docket 254.

7 Counsel, please make your appearance for the record.

8 MR. MCKAY: John McKay for the plaintiffs, your Honor.

9 THE COURT: Good morning, Mr. McKay.

10 MR. MCKAY: Good morning, sir.

11 MR. MAYE: Brian Maye and Charles Michalek for  
12 defendants, your Honor.

13 THE COURT: All right. Good morning.

14 MR. MAYE: Good morning.

15 THE COURT: All right. We are here on number 254,  
16 which is plaintiff's motion for sanctions related to the  
17 Rule 35 examination.

18 Additionally, at number 297, plaintiff filed a request  
19 to file a reply to the motion. Apparently, there was some  
20 issues with getting that filed timely and plaintiff asks to  
21 allow that reply brief to be filed and for my consideration. I  
22 will grant 297 allowing that reply. It does appear as though  
23 there was some problem with the efforts of filing it at that  
24 time and so I have looked at it and I will consider that.

25 So Jerry, make sure -- that was gavelled, so make sure

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1     that that's granted so that it is ungavelled --

2             THE COURTROOM ADMINISTRATOR: Yes, your Honor.

3             THE COURT: -- after today's hearing.

4             Also, as the parties know, on occasions that I've had  
5     hearings on motions, the transcript today will be the order  
6     resolving 254.

7             So with that, let me make my record about the context  
8     of the case, the motions, the pleadings, the legal standard,  
9     and then we'll talk a little bit about the motion and I want to  
10    hear from -- from the parties.

11            So for context, this is a discrimination action  
12    arising out of Frontier employees' separation of Peter  
13    DelVecchia and his adopted son, A.D., during a flight because  
14    the employees erroneously suspected human trafficking.  
15    Plaintiff alleges that the employees racially profiled them.  
16    Plaintiff sued defendants for compensatory and punitive damages  
17    alleging claims for discrimination, a violation of Title 41  
18    United States Code Section 1981, intentional infliction of  
19    emotional distress, false imprisonment, battery and assault,  
20    and defamation (unintelligible).

21            Plaintiff, in their motion, moves to exclude the  
22    defendant's expert, Stephanie Holland, or for production of  
23    recordings of examinations of plaintiff, A.D., and an extension  
24    of the deposition deadline. They argue the defendants violated  
25    the Court's order by disclosing the expert report three weeks

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1 after the deadline, the fact that Dr. Holland's report does not  
2 contain her raw testing data, the fact that Dr. Holland  
3 improperly recorded the examination and violated -- in  
4 violation of my order on her cell phone, and that she conducted  
5 the examination in an adversarial manner.

6 The plaintiff asks that if I do not exclude her  
7 testimony, that I at least allow them to listen to the  
8 recording, that it be produced along with the raw data, and  
9 that I extend discovery for four weeks so that they -- from the  
10 production date so that they can consider that before deposing  
11 the doctor and before noticing their own expert witness or a  
12 rebuttal witness.

13 Defendant responds that plaintiff never raised these  
14 issues with the defense and did not attempt to meet and confer  
15 with the defendant before filing the motion. They argue the  
16 untimely disclosures of the report was the result of a number  
17 of circumstances including the rescheduling of the examination  
18 and that, in any event, untimeliness of the disclosure is  
19 harmless.

20 As to the raw data, defendants argue that the Court  
21 never ordered the data to be turned over and that if plaintiff  
22 would have asked for it, they would have provided it.

23 Defendant argues that Dr. Holland never conducted the  
24 examination in an adversarial manner and that her recording of  
25 the examination did not intentionally violate the Court's order

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1 and was done to accurately capture A.D.'s responses and did not  
2 otherwise prejudice the plaintiff.

3 The reply that I previously referenced raises issues  
4 like gaslighting, what-about-ism, attacks defense counsel,  
5 describes many of the plaintiff's professional accomplishments,  
6 re-raises prior Court decisions which the plaintiff disagrees,  
7 but as best as I can tell, plaintiff, essentially, reiterates  
8 that the defendant has violated the Court's prior orders  
9 regarding the examination and that sanctions are warranted for  
10 the violations.

11 Now, as it relates to the legal standard, first,  
12 sanctions for disobedience of a pretrial order, Federal Rule of  
13 Civil Procedure 16(f)(1)(C) allows a party on motion or on its  
14 own to issue "any just orders" including those authorized by  
15 Federal Rule of Civil Procedure 37(b)(2)(A), sections (ii)  
16 through (vii) if a party fails to obey a scheduling or other  
17 pretrial order.

18 Sanctions under Rule 37(b)(2)(A)(ii) include  
19 prohibiting the disobedient party from supporting or opposing  
20 designated claims or defenses or from introducing designated  
21 matters into evidence. Local Rule 11-8(e) provides that the  
22 Court may, after notice and an opportunity to be heard, impose  
23 any and all appropriate sanctions on a party or an attorney who  
24 fails to comply with any order of the Court.

25 Now, as it relates to sanctions related to disclosing

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1 witnesses, Federal Rule of Civil Procedure 26(a)(2)(D) provides  
2 that a party must disclose expert witnesses at the times and in  
3 the manners -- the sequence that the Court orders. Federal  
4 Rule of Civil Procedure 37 gives teeth to Rule 26 disclosure  
5 requirements by forbidding the use at trial of any -- at trial  
6 of any information that is not properly disclosed. That's  
7 Goodman vs. Staples the Office Super-Store, LLC, 644 F.3d 817  
8 at 827. That's a Ninth Circuit case from 2011.

9           If a party fails to identify a witness as required by  
10 Federal Rule of Civil Procedure 26(a), under Rule 37(c)(1),  
11 that party is not allowed to use that witness to supply  
12 evidence on a motion at a hearing or at trial unless the  
13 failure was substantially justified or is harmless. In  
14 connection with or instead of the sanctions of excluding the  
15 witness, the Court may, on motion and after giving an  
16 opportunity to be heard, order payment of the reasonable  
17 expenses, including attorney's fees, caused by the failure,  
18 inform the jury of the party's failure, and impose other  
19 appropriate sanctions including any of the orders listed in  
20 Rule 37(b)(1)(A), (i) through (vi).

21           District Courts have identified and the Ninth Circuit  
22 has acknowledged several factors to guide the determination of  
23 whether substantial justification and harmlessness exists  
24 including prejudice or surprise to the party against whom the  
25 evidence is offered, the ability of that party to cure the

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1 prejudice, the likelihood of disruption of the trial, and bad  
2 faith or willfulness and not timely disclosing the evidence.  
3 That's Liberty Insurance Corporation vs. Brodeur, 41 F.4th 1185  
4 at 1191 through 92. And that's a Ninth Circuit case from 2022.

5 And now, as it relates to the independence of medical  
6 examiners, though commonly referred to as an independent  
7 medical examination, there is nothing in the rule requiring  
8 that the examiner be independent or unconnected to any adverse  
9 party. That's Hernandez vs. Vanveen. That's a 2015 District  
10 Court case from this district. It's found at LEXIS 606683.

11 Indeed, it is often although not always the case that  
12 a Rule 35 examiner also serves as a Rule 26 expert. And that's  
13 the same case. That same case also stands for the proposition  
14 that a deposing party may depose a Rule 35 examiner who also  
15 serves as a retained or specially employed nontestifying  
16 expert. And finally, that case stands for the proposition that  
17 an examiner should conduct an exam in as non-adversarial a  
18 manner as possible.

19 So with that, Mr. Maye, notwithstanding my comments  
20 about the reply, I think the -- the plaintiff raises a good  
21 point. You -- you did the examination in contravention of my  
22 order. And she recorded it. Why did she record it?

23 MR. MAYE: First, your Honor, a note of clarification.  
24 The docket entry 297, that did not relate to this motion. It  
25 related to the motion for summary judgment.



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1           THE COURT: Oh. It did? I'm sorry. Was the reply  
2 timely on this one then or?

3           MR. MAYE: It was, your Honor.

4           THE COURT: All right. We must have missed that then.  
5 Thank you for that correction.

6           Jerry, there's a lot of things on this docket. And so  
7 I was in error. So don't do anything with 297. I don't know  
8 if that's -- that's probably gavelled for Judge Dawson.

9           So thanks for that correction.

10          MR. MAYE: Sure, your Honor.

11          THE COURT: Go ahead.

12          MR. MAYE: With respect to the recording, Dr. Holland  
13 is a Nevada psychologist and she does examinations often in  
14 Nevada and it's pretty standard in Nevada to record  
15 examinations.

16                When we advised Dr. Holland about your Honor's order,  
17 the parameters, it appeared, to us, she was clear on those  
18 parameters. Ultimately, what we think happened is the IME  
19 ultimately got delayed and I think she just forgot or, you  
20 know, didn't -- didn't review the information that we  
21 previously provided to her.

22                But, in any event, she did use a recording device.  
23 And it wasn't done in bad faith. It was, you know, an  
24 inadvertent violation of this Court's order. And ultimately,  
25 our view is it didn't prejudice plaintiffs. And we would

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1 invite your Honor to listen to the recording. We have not  
2 listened to the recording.

3 THE COURT: Is it the whole -- how long was the exam?

4 MR. MAYE: The exam, I believe, was approximately four  
5 hours, and it's our understanding the recording was  
6 approximately 25 minutes.

7 THE COURT: So the whole exam wasn't recorded?

8 MR. MAYE: That's correct, your Honor. That is what  
9 has been represented to us by Dr. Holland.

10 THE COURT: So what she -- why record some of it and  
11 not others?

12 MR. MAYE: I think what -- what she represented to us  
13 was she turned the recording on at some point and the recording  
14 turned itself off and she never turned it back on. So it  
15 wasn't on her mind to -- to turn it back on.

16 THE COURT: But you're telling me the purpose of her  
17 to turn -- at least if I'm reading your papers correctly, that  
18 she had the recording to make sure that -- I -- you describe it  
19 as a protection for A.D. so that the answers are accurate, the  
20 report is accurate, and that she's hearing him correctly.

21 Isn't that what she -- why she did this?

22 MR. MAYE: Yeah. I think --

23 THE COURT: So it goes off after 20 minutes and she  
24 doesn't care? That sure seems, to me -- I mean, if she needs  
25 it for that purpose, then she needs it on the whole time and

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1 she needs to make sure it's on. That seems like a very  
2 disingenuous statement that, "I recorded 20, 25 minutes of a  
3 six-hour -- or four-hour interview, and, oh, I forgot it" --  
4 and it -- I mean, that's not -- that's not ringing true to me.

5 MR. MAYE: Your Honor --

6 THE COURT: I'm not saying it for you.

7 MR. MAYE: Yeah.

8 THE COURT: I'm talking about your doctor.

9 MR. MAYE: Yeah. She represented to us that she does  
10 this out of routine, and in this case, she did it out of  
11 routine. And -- and something happened that turned the  
12 recording off.

13 In any event, your Honor, you know, we -- we would  
14 invite you to listen to the whole recording.

15 I mean, Dr. -- Dr. Holland is a very -- very respected  
16 professional in the State of Nevada. She is -- she is -- is  
17 highly-respected, very professional, and there was no bad faith  
18 here. So it -- you know, she --

19 THE COURT: We're in a highly contentious case in  
20 which the parties are disagreeing over all aspects of  
21 discovery, over all aspects of things in this case. I -- you  
22 know, we're up to 300 documents filed on the docket. And this  
23 is the case where she inadvertently, in good faith, records the  
24 -- the examination?

25 MR. MICHALEK: Your Honor, (unintelligible) be heard

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1 on the bad faith issue?

2 As the Court well knows, the -- the legislature passed  
3 AB244 --

4 THE COURT: Oh, I know.

5 MR. MICHALEK: -- and --

6 THE COURT: I got in a discussion Saturday night with  
7 the discovery commissioner about that. We're not in State  
8 Court. It's not a substantive -- it's a procedural -- we've  
9 founded a procedural aspect so that it's -- it doesn't apply in  
10 Federal Court. Until the Ninth Circuit tells me otherwise,  
11 that's -- that's the law.

12 MR. MICHALEK: And I certainly understand that. I  
13 just want to make the point that the plaintiff's bar got that  
14 statute passed specifically to overturn and overrule Rule 35  
15 examinations so that -- so that AB244 applied.

16 And the -- and if you remember the prior court case  
17 where the Supreme Court said, well, that was unconstitutional,  
18 is because there wasn't a remedy in that statute. Well, there  
19 is now. And so that side of the aisle -- and I'm not saying I  
20 agree or disagree, but that side of the aisle is saying, no,  
21 no, no, these exams did -- the statute was made to trump  
22 Rule 35 exams. That's -- that's all I want to put on the  
23 record.

24 THE COURT: Well -- all right. And why wasn't the  
25 report -- I mean, why are we three, four weeks late on the

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1 report?

2 I mean, again with this case, it would seem that you  
3 wouldn't want to have any issues being raised by the other side  
4 not following the orders. And it just gets -- it -- you know.

5 MR. MAYE: Your Honor, for probably more than a year,  
6 multiple orders, the -- the agreement between the parties and  
7 the Court's order was that the report would be issued 30 days  
8 after the completion of the examination. Ultimately, at some  
9 point, your Honor said, well, once you get that examination  
10 deadline set, you want a new order to set on the record when  
11 that examination was and that the report would be due 30 days  
12 thereafter. And we did that. So we had a date for the  
13 examination, and 30 days thereafter, our report was due.

14 Our doctor went to the airport. Her flight was  
15 cancelled. She could not get to North Carolina. And, of  
16 course, we -- we offered to have this in North Carolina to  
17 accommodate plaintiffs. So she had to go to North Carolina  
18 to --

19 THE COURT: I think I ordered it in North Carolina,  
20 but -- anyway. Go ahead.

21 MR. MAYE: And -- so contacted plaintiff's counsel,  
22 said she cannot get to North Carolina to complete the  
23 examination tomorrow. So we'll have to reschedule.  
24 Plaintiff's counsel said that's fine. We agreed to a date.  
25 Plaintiff's counsel didn't raise any issue. Didn't say, wait a

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1 second here, the examination would be in violation of the court  
2 order because we have on the -- there's been a order entered  
3 setting the date for the examination. And the report was due  
4 30 days thereafter.

5 The parties agreed to a new deadline, a new date for  
6 the IME, and given that it's always been understood and always  
7 an order by the Court that we get 30 days thereafter to submit  
8 the report, we never thought it would be an issue. We never  
9 even thought that --

10 THE COURT: So was the report then after the -- after  
11 the act of God or whatever the problem was getting to Carolina,  
12 you reset it. Was -- did you provide them the report 30 days  
13 after that date?

14 MR. MAYE: Yes, your Honor. Yes, your Honor.

15 And after that --

16 THE COURT: Essentially, you thought because you moved  
17 it, you were complying with it? It was -- okay.

18 MR. MAYE: That's right. That's right.

19 And we never -- plaintiff's counsel never indicated to  
20 us that that wasn't acceptable. And had we known that there  
21 would have been an issue with that, we would have filed a  
22 motion with the Court and I assume it would not have been  
23 objected to.

24 THE COURT: I'm more inclined on that issue to agree  
25 with you, then, if it was within 30 days of the time of the

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1 reschedule. Then it would have at least complied with the  
2 spirit of the order given that there was a change unbeknownst  
3 to me with the flight schedule and everything. And that  
4 happens. And so that's not wholly unreasonable.

5 What about the -- I didn't see, in looking at my order  
6 and Judge Dawson's order on this issue, that I ordered the raw  
7 data, but it seems, from your pleadings, that you would turn  
8 that over if -- if they ask for it?

9 MR. MAYE: Of course, your Honor. That was not an  
10 issue.

11 We -- when we objected -- when we responded to  
12 plaintiff's motion for protective order -- or I'm sorry --  
13 maybe -- I think it was our motion -- motion to compel Rule 35  
14 examination, plaintiffs objected to it. We said, listen, we'll  
15 provide the raw data. We'll make it available. And that's as  
16 far as that went. So that was reflected in -- I think in your  
17 order and Judge Dawson's order that we would make it available.  
18 We have never heard from plaintiff's counsel that, hey, where's  
19 the raw data? We want the raw data.

20 And in any event, your Honor, the raw data would have  
21 to be transferred from psychologist to psychologist. We don't  
22 have the raw data. It can't be produced to us. It has to go  
23 from our expert to their expert. So if -- if plaintiffs asked  
24 us, hey, we want the raw data, can you arrange to transfer it  
25 to our psychologist, of course, we would do that.

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1           Just like we've asked for their raw data, you know.  
2       They have not produced it. We also issued a subpoena to their  
3       experts for raw data. Haven't received it.

4           So we are absolutely willing to provide --

5           THE COURT: It --

6           MR. MAYE: -- your Honor.

7           THE COURT: Well -- and those last comments, that just  
8       fuels the tit for tat.

9           MR. MAYE: I know, your Honor.

10          THE COURT: I mean, boy, this is --

11          MR. MAYE: I apologize.

12          THE COURT: -- a case that has a lot of tit for tat.

13          MR. MAYE: Yes. I apologize. But --

14          THE COURT: All right.

15          MR. MAYE: -- the point is we're -- we're willing to  
16       provide the raw data.

17          THE COURT: So that's all I have. I want to ask  
18       Mr. McKay a couple things.

19               And so I guess the -- the recording, I -- I,  
20       obviously, have a problem with because that's in violation of  
21       my order.

22               The -- what -- but the late -- I mean, wouldn't it be  
23       30 days from the date of the examination? I mean, we wouldn't  
24       keep the same date if we moved the examination three weeks.

25          MR. MCKAY: Do you want me here or there?



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1 THE COURT: Wherever you're comfortable.

2 MR. MCKAY: Okay. And I -- just on that issue, I --  
3 before I answer your question, I apologize. The very first  
4 time I appeared in front of you, I asked if I should stand and  
5 what I meant to say was should I stand at the podium, and I  
6 somehow didn't get that out.

7 THE COURT: All right.

8 MR. MCKAY: And I apologize sincerely about that.

9 THE COURT: No need to apologize. I honestly don't  
10 even recall that aspect of it. But...

11 MR. MCKAY: So, your Honor, the -- Mr. Maye's argument  
12 doesn't give any effect to the language of your March 6th  
13 order. Your March 6th order said, no, no, no, we don't want  
14 anymore of this 30 days after an unknown date. We want  
15 concrete deadlines.

16 Now, I (unintelligible) to point out that the date of  
17 the exam was not part of that order. The three things that we  
18 were ordered to provide were a date for the disclosure of  
19 Dr. Holland's report, a date for disclosure of a rebuttal  
20 expert, and a date for the deposition of Dr. Holland. So that  
21 with respect to moving the date of the exam, that didn't have  
22 any effect on the order that you had -- that you ultimately  
23 entered. So as far as the 30 days go, we had been dealing with  
24 that as just a pro forma.

25 But I don't know how long it takes Dr. Holland to

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1 issue a report. When Mr. Maye asked for dates and I gave him  
2 dates and he chose one that was seven days before the deadline  
3 or six days -- I forget -- before the disclosure deadline, I  
4 had just assumed that if he -- if she needed more time, he  
5 would move the Court. I couldn't extend that. I mean, that's  
6 the --

7 THE COURT: I guess I didn't foresee in my order that  
8 something would come up in terms of the travel. And I guess  
9 I -- I will now, in future orders, consider whether or not  
10 there might be travel issues or things that -- that come up.  
11 Because I -- I would have to say, as I sit here, I mean, I  
12 understand what you're saying but it would have been my intent  
13 to say, look, 30 days from when it happened. But I also recall  
14 wanting to have firm dates because I didn't want to have this  
15 stuff out there.

16 MR. MCKAY: Exactly.

17 THE COURT: All right. So let me -- I -- I'm inclined  
18 to -- I'm not inclined to take the drastic step of excluding  
19 the testimony because I understand the change in the law in  
20 Nevada. And you may or may not be aware of that, but it has to  
21 do with these examinations. And if she does a lot of these  
22 examinations in State Court, there might have been some  
23 confusion. And I -- I just don't have enough before me to  
24 think that she willfully, you know, intentionally looked at  
25 this order and said, "I'm not going to follow this. I'm going

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1 to do my own thing."

2 But she recorded some of it. And I think that -- in  
3 violation of that order, there has to be some sanctions, and  
4 I -- and I'm inclined to grant what you've requested in the  
5 alternative, which is to listen to that and they can listen to  
6 it and then give you some time to -- to reopen discovery to  
7 give you a limited amount of time to take that deposition and  
8 do whatever you think you need to do in response to whatever  
9 was recorded and why.

10 I am acutely aware that I am likely creating more  
11 litigation for me as we go forward on this as it relates to the  
12 depo and the like, but, again, I -- I put strict orders in this  
13 because this was a very hotly contested issue, like a lot of  
14 other issues in this case, and I wanted to make sure there were  
15 clear parameters. And they've been violated.

16 What other prejudice, though -- if I grant that, that  
17 aspect, and don't exclude her, does that cure your prejudice?  
18 Or are there other issues? I want to give you an opportunity  
19 to tell me about the prejudice you feel you and your client  
20 have suffered as a result of how this examination was  
21 conducted.

22 MR. MCKAY: I would ask, your Honor, to -- to look at  
23 the depo -- or the declaration of A.D. A.D. is a very  
24 well-spoken young man, but he was traumatized by this incident.  
25 And he was further traumatized by the examination. I mean,

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1 this was really -- I get it as far as Rule 35 exams. And I  
2 think that, at some point in the future, it would be really  
3 nice if the courts would come up with a better set of rules  
4 for -- for Rule 35. But I'm -- I'm always willing to agree.

5 And it has always been my experience that doctors  
6 especially act very appropriately even if they're going to be  
7 expert witnesses in these exams. This was not such a case.

8 In this case, A.D. testified that he was asked about  
9 his father's dating practices, the colors of his sisters'  
10 skins. He was asked why he -- he thought that white people  
11 caused racism. He was -- he was asked a number of challenging  
12 questions. He was told that his father touching his face is  
13 not affection and that -- and that Dr. Holland's husband  
14 doesn't touch their children's faces. She looked at him  
15 like -- like he was crazy, according to him.

16 THE COURT: And these are all his perceptions?

17 MR. MCKAY: These were his perceptions.

18 THE COURT: So that leaves me with his perceptions  
19 versus hers, which I'm sure are going to be diametrically  
20 opposed.

21 MR. MCKAY: Of course.

22 THE COURT: So -- so the prejudice then is -- is the  
23 retraumatization that he had with the four hours with the  
24 doctor. What else?

25 MR. MCKAY: And then I need to deliver all this anew

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1 to my expert to review so that he or she -- I have two experts  
2 that had to do with one of them getting pregnant and so we --  
3 we ended up with her colleague now, also retained. So one of  
4 them needs to review all of the tape, all of the raw testing  
5 data and tell us what -- and the report and tell us whether the  
6 report has been appropriately done or inappropriately done.  
7 And we need to provide that to the Court.

8 THE COURT: Okay.

9 MR. MCKAY: So that's an expense for --

10 THE COURT: So at that stage, then, you would decide  
11 whether or not you need to depose --

12 MR. MCKAY: Yes, sir.

13 THE COURT: -- Dr. Holland?

14 MR. MCKAY: Exactly.

15 THE COURT: So you think that that could all be  
16 accomplished within three to four weeks of receiving the raw  
17 data and the -- the --

18 MR. MCKAY: I'm speaking for people that -- you know,  
19 I don't --

20 THE COURT: That's what you put in --

21 MR. MCKAY: I'm guessing.

22 THE COURT: All right. Well, you put that in your  
23 pleading so -- and I was assuming --

24 MR. MCKAY: No, I did. I did, your Honor. And I -- I  
25 didn't do it based on contact with them. I just assumed that

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1 we could get it done. I mean, I just made the assumption.

2 THE COURT: Well, I assume you don't have an issue as  
3 it relates to the raw data going from expert to expert as  
4 opposed to going through --

5 MR. MCKAY: No.

6 THE COURT: -- attorneys? Okay.

7 MR. MCKAY: No, not at all.

8 And I would point out that they did not subpoena raw  
9 data. They subpoenaed the files. The files showed up at the  
10 depositions. And Mr. Maye never asked about the raw data.

11 THE COURT: Well, again, I'm not going to go down  
12 that tit for tat rabbit hole.

13 All right. Look at my notes and see if there's any  
14 other questions or things I want.

15 This is what I'm going to do. I'm going to grant in  
16 part and deny in part number 254. I'm going to deny it insofar  
17 as I'm not going to exclude the testimony of Dr. Holland, but I  
18 am going to order Dr. Holland to turn over whatever recording  
19 she has of the examination, however long it is, the entire  
20 recording. I will order her to turn over her raw data directly  
21 to the expert designated by Mr. McKay. I presume it's one of  
22 the two experts that he just referenced.

23 I will reopen discovery for the limited purpose of  
24 allowing your experts to review this and consider it and advise  
25 you and then you to depose Dr. Holland on these issues.

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1 Have you already deposed her or no?

2 MR. MCKAY: (Inaudible.)

3 THE COURT: Okay. Then allow you to depose  
4 Dr. Holland once you've received and considered those. But  
5 I'm -- I'm going to put a four-week limit on that. And I  
6 understand we're in the holidays, but this is a very limited  
7 matter. People may need to rearrange schedules. But we are --  
8 let me find Judge Weksler's calendar.

9 The motions for summary judgment are ripe; is that  
10 correct?

11 MR. MCKAY: That's correct, fully briefed.

12 THE COURT: And when did they become ripe? In the  
13 last month, is it?

14 MR. MCKAY: Yes, just on the 30th. Well, the 1st  
15 because of the issue that your Honor mentioned initially about  
16 the --

17 THE COURT: The other -- the other reply? Gotcha.

18 MR. MAYE: Actually, the motion's not fully briefed.  
19 We still have to file our -- the reply.

20 MR. MCKAY: Oh, I apologize.

21 MR. MAYE: Yes. Ours was response. Their reply is --

22 THE COURT: All right. And the reason I ask is four  
23 weeks is literally on New Year's Day. And as mean as this old  
24 judge might be, I don't want to necessarily do that to you  
25 guys.

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1           MR. MAYE: Your Honor, I'm sorry. You said Judge  
2           Weksler?

3           THE COURT: I was just looking at her calendar because  
4           we're --

5           MR. MAYE: Judge Dawson.

6           THE COURT: I was looking at her calendar because  
7           we're in her courtroom. That's all I referenced --

8           MR. MAYE: Oh. I see.

9           THE COURT: That's all I referenced Judge Weksler for.

10          MR. MAYE: Oh, okay. Yes, sir.

11          THE COURT: But as I count out the days, that puts it,  
12          again, right on January 1st.

13                 So I'm going to -- I'm going to give you -- I'm going  
14          to open discovery until January 8th. So that will be five  
15          weeks. Again, that takes into consideration that we're right  
16          in the middle of the holidays coming up.

17                 But I want that -- how long -- well, you know what,  
18          I'm going to -- I mean, can you get that -- can you get that  
19          over to him -- your expert get that over to them no later than  
20          Friday? Is that reasonable?

21          MR. MAYE: I think that's reasonable, your Honor.

22          THE COURT: Okay. So here's what we'll do then. I'm  
23          going to order that to be turned over on December 8th, the raw  
24          data, whatever the recording is. Then what we'll do is we'll  
25          go from December 8th. That will work better. So if I go four



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1 weeks from December 8th -- I'll go five weeks and give you  
2 until January 12th to address simply the issue of Dr. Holland  
3 and whether you're going to depose her after your experts have  
4 taken into consideration whatever it is that they consider.

5 MR. MCKAY: And that would be the -- the actual -- so  
6 the -- by the 12th, you're expecting that we would have deposed  
7 her if we --

8 THE COURT: Yes.

9 MR. MCKAY: -- so choose? Okay.

10 THE COURT: Because that's the only reason I'm  
11 reopening discovery and I want to make sure that that's done.  
12 And the motions, you know, will be pending before Judge Dawson  
13 and we'll just be waiting for a decision from him and discovery  
14 will be closed. And then once he rules on the motions for  
15 summary judgement, if they're not entirely granted, we'll all  
16 be back here for a settlement conference in front of me.

17 MR. MAYE: Your Honor, one question.

18 You know, I represented that it seemed reasonable to  
19 produce the raw data and the recording by Friday, but I don't  
20 know how quickly Dr. Holland can do that. I will contact her  
21 immediately.

22 To extent she says, hey, she needs until -- you know,  
23 she needs ten days or she's not available, you know --

24 THE COURT: You know, it better be a -- look. It  
25 shouldn't -- I can't conceive of why she couldn't say, "You

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1 know what, I'll -- I'll drop what I'm doing for an hour and  
2 I'll get this raw data." I mean, she's got to have a file on  
3 it. So, no, it's -- if there's a problem, you can raise it,  
4 but I -- I am not going to look kindly on her saying, "Oh, I  
5 can't get this by Friday." It shouldn't be that much  
6 information. She should have a recording. And she's got a  
7 file on it, I'm sure. Provide the stuff by Friday.

8 MR. MAYE: Yeah, I --

9 THE COURT: All right.

10 MR. MAYE: -- agree it shouldn't be an issue.

11 THE COURT: No, I understand. You're -- you know, had  
12 you not --

13 MR. MAYE: (Unintelligible).

14 THE COURT: -- of your doctor, but I can't see why  
15 this would be a -- a problem providing it by Friday. So by  
16 5:00 on Friday.

17 All right. Mr. McKay, anything else?

18 MR. MCKAY: Nothing else, your Honor. Thank you.

19 THE COURT: All right. Mr. Maye, anything else?

20 MR. MAYE: Yes, your Honor. One issue.

21 We've asked for the raw data from plaintiff's experts  
22 related to their examination and testing of A.D.

23 THE COURT: I presume your expert doesn't have a  
24 problem shooting that raw data over to their expert in the same  
25 procedure that they're doing for you?

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1 MR. MCKAY: I can make the same assumption, yeah.

2 THE COURT: All right. So I -- it's -- get -- get the  
3 information back and forth to the experts so that's resolved.  
4 All right.

5 MR. MCKAY: By the same deadline or?

6 THE COURT: Yeah. Let's keep this moving.

7 MR. MCKAY: Okay.

8 THE COURT: All right. Anything else?

9 MR. MAYE: No, your Honor.

10 THE COURT: All right. Jerry, any questions on the  
11 order?

12 THE COURTROOM ADMINISTRATOR: No, your Honor.

13 THE COURT: All right. The transcript will be the  
14 written order and the minute order will just reflect what we've  
15 done here today. Thank you all very much.

16 MR. MCKAY: Thank you.

17 MR. MAYE: Thank you.

18 THE COURT: Have a good rest of your week.

19 (The proceedings concluded at 4:41 p.m.)

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COURT REPORTER'S CERTIFICATE

I, SAMANTHA N. MCNETT, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: December 7, 2023

/s/ Samantha N. McNett  
Samantha McNett, RMR, CRR, CCR